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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

January Term, 1975

No. 74-860

JAMES BURTCHETT,

Petitioner,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Morrison, Ettien & Barron
339 Third Street
P. O. Box 1030
Havre, Montana 59501
Counsel for Petitioner.

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NO. .....

IN THE

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January Term, 1975

JAMES BURTCHETT,

Petitioner,

- vs -

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioner, Burtchett, prays that certiorari issue to review the judgment of the Montana Supreme Court affirming his conviction and sentence by the Trial Court.

OPINION BELOW

The opinion of the Montana Supreme Court for which review is requested is reported at _____ P 2d _____, and set out at Appendix No. B hereof.

Petition for rehearing was denied October 21st, 1974. (App. No. D).

JURISDICTION

Jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code.

QUESTION PRESENTED

Whether the facts, events and circumstances occurring during a 15 month delay prior to filing information, prejudiced Burtchett in the preparation and presentation of his defense.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, United States Constitution, provides in part:

> " . . . No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment, United States Constitution, provides in part:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF FACTS

Petitioner, Burtchett, was charged with and convicted of (1) arson and (2) arson with intent to defraud his insurer, committed May 14, 1971.

The charges were based principally on an investigation by one Habeger, Havre City fireman and deputy state fire marshall who, one week after the fire, took samples of the first floor from seven areas, placed them in two cans and, on May 24, 1971, sent them to the U. S. Treasury Forensic Laboratory for testing to determine whether or not accelerants were present. (A government chemist testified he drew vapors from the cans showing the presence of elements common to gasoline or naptha.)

In the latter part of June, 1971, the laboratory mailed a report to Habeger stating that both samples showed the presence of elements common to gasoline or naptha.

The report laid in Habeger's office until the latter part of

September, 1972, 15 months, when Habeger discovered it and submitted it along with other findings to the County Attorney who filed charges November, 1972.

The burned premises remained as is until May 1972, when, after insurance settlement in March, 1972, and after determining the property not repairable, Burtchett salvaged what he could, and burned the unsalvageable remains with consent and knowledge of the County fire chief, and the Havre City fire chief. The latter was Habeger's superior and knew that the fire was deemed suspicious and knew samples had been sent to the Forensic Laboratory.

Motion to dismiss for prejudicial preinformation delay under the Fifth, Sixth and Fourteenth Amendments, (Appendix No. 'A') was heard pre-trial and denied on the ground that prejudice was not shown. The motion was renewed at the close of the State's case, and renewed again at the close of evidence.

Testimony in connection with the motion established that, in the course of thawing frozen pipes during winter months, a great deal of heavy, sooty smoke from firing kerosene, distillate and gasoline in a heater under the house had impregnated the underflooring of the rooms, where the fire occurred, with petroliferous compounds. Also, that linoleum flooring had been laid down with an asphalt base adhesive, and that the adhesive had impregnated and become fixed to the wood flooring.

Testimony was that the fire burned with intense heat.

Yeager, a college teaching chemist, testified for Burtchett. The government laboratory report showed that hexane was present in the samples submitted by Habeger. Yeager testified that in such heat he would expect hexane to be evaporated and not be present in any samples taken by Habeger.

The substance of Yeager's testimony was that, in view of the impregnation of the flooring, he could subject samples of any part of the impregnated area to heat similar to the fire and chromatographic tests would show the same elements enumerated by the government chemist. The substance of the government chemists' testimony was that Yeager could not because the conditions were different. Much of the government's contradiction was based on time element and

temperature, it being stated that the elements reported in the samples would not be detectable after a week or more. The fire was May 14, the samples were taken May 21st.

The critical testimony of Yeager is at Appendix E.

Motion was made to exclude the canned samples on ground of taint by commingling.

Habeger testified he took seven floor samples from the ground floor area. His testimony varied in that anywhere from one to three samples went into the first can, and from four to six samples went into the second can. His stated purpose in taking the samples was to show the floor at each sample area contained accelerants. His further testimony on the motion was that the first can contained samples from the point of origin in the area of a floor furnace. During trial, his testimony was that the seven samples showed seven points of origin.

On the hearing on the motion to exclude, had prior to trial, the Court denied the motion. After trial foundation, the Court admitted the first sample can, but exluded the second can. The first can was admitted on the basis it was shown that all its samples came from the point of origin of the fire; the second excluded on the grounds that the samples were tainted by commingling.

On the motion to dismiss for prejudicial delay, renewed at close of the State's case, and again at close of evidence, it was argued, in addition to the chemist's testimony, that by loss of the premises, Burtchett had no opportunity to test the inconsistent testimony of Habeger in relation to his sampling of the floor areas.

The Montana Supreme Court ignored this contention in its opinion.

On appeal, the Montana Supreme Court, in affirmance ruled no actual prejudice was shown. Petition for rehearing was denied October 21, 1974. (App. D)

REASONS FOR GRANTING WRIT

The Due Process Clause of the Fifth Amendment by this Court's decision in *United States vs. Marion*, 404 U. S. 307, 92 S.Ct. 455, 30 L.Ed. 468 (1971), protects defendants' rights in criminal cases with respect to events occurring prior to information, which events may so prejudice a defendant as to require dismissal of the prosecution.

By the Fourteenth Amendment, the rule of *Marion* applies to the States.

This Court has not yet reported a record factual situation for the purpose of determining whether or not such situation occurring during preinformation delay is prejudicial to defendant's defense.

The reasoning behind the application of the Fifth Amendment to the pre-information state delays was explained by Mr. Justice Douglas in his concurring opinion in *Marion*.

> Those delays may result in a loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the state may proceed methodically to build its case while the prospective defendant loses his. 404 U. S. at 331, 92 S.Ct. at 469, 30 L.Ed.2d at 485 (1971). *Cf. Nickens v. United States*, 323 F.2d 808, 818 (D.C. Cir. 1963) (Wright J. concurring opinion); Schneider, *The Right to a Speedy Trial*, 20 *Stan. L. Rev.* 476, 489 (1967-68)

Due to the application of the Fifth Amendment due process protections to pre-accusation delays, a qualification of the federal and state governments' rights to bring a criminal charge within the applicable statute of limitations has occurred. "(I)t is appropriate to note here that the statute of limitations does not fully define . . . (a defendants') rights with respect to events occurring prior to indictment." *Marion*, 404 U.S. at 324, 92 S.Ct. at 465, 30 L.Ed.2d at 480-81 (1971). The Fifth Amendment protection is an additional safeguard. The applicable statute of limitations will be controlling absent a defendants' establishment of prejudicial delay violative of the Fifth Amendment. *United States v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972); *United States v. Stein*, 456 F.2d 844, 848, (2d Cir. 1972, *cert. denied* 408 U. S. 922 (1972); *United States v. Edwards*, 458 F.2d 875, 882 (5th Cir. 1972); *United States v. Detienne*, 468 F.2d 151, 156 (7th Cir. 1972) *cf. United States v. Ewell*, 383 U. S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627, 632 (1966).

This Court in *Marion* did not determine under what conditions "actual prejudice" would require dismissal of a prosecution. 404 U.S. at 324, 92 S.Ct. at 465, 30 L.Ed.2d at 481 (1971). The court made the issue more complex by more dicta later in the opinion which cast

doubt on whether or not just "actual prejudice" was required for dismissal regardless of the circumstances:

> No actual prejudice to the conduct of the defense is alleged or proven, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them . . . Events of the trial may demonstrate actual prejudice but at the present time appellees' due process claims are speculative and premature. 404 U. S. at 326, 92 S.Ct. at 466, 30 L.Ed.2d at 481-82 (1971).

At least one lower federal court has recognized this issue and questioned "whether a successful claim under the due process clause must establish both actual prejudice and intentional delay on the part of the Government or whether the former alone would be sufficient." *United States v. Iannelli*, 461 F.2d at 485 n. 2 (2d Cir. 1972). Other courts have seemingly skirted the issue. *See, United States v. Robertson*, 55 F.R.D. at 15 (D.D.C. 1972). In any event, the position taken by the Supreme Court has left this issue open for interpretation by the lower courts. It is subsequent lower court interpretation which has resulted in the existence of two tests.

From reading the cases, "actual prejudice" includes prejudice resulting merely from the delay *or* as a result of a purposefully oppressive delay. Both delays are "actual" in terms of prejudice. The term "substantial prejudice" is used mainly as an early recognition that more than a mere trifle of delay is necessary to constitute a Fifth Amendment violation. For the most part "substantial" appears to be an undefined increment of "actual prejudice" with the real requirement remaining the singular proof of actual prejudice. *See, United States v. Stein*, 456 F.2d 844, 848 (2d Cir. 1972); *United States v. Iannelli*, 461 F.2d 483, 485 (2d Cir. 1972); *United States v. Dukow*, 453 F.2d 1328, 1330 (3rd Cir. 1972); *United States v. Edwards*, 458 F.2d 875, 882 (5th Cir. 1972); *United States v. Hauff*, 461 F.2d 1061, 1065 (7th Cir. 1972); *United States v. White*, 470 F.2d 170, 175 (7th Cir. 1972); *United States v. Emory*, 468 F.2d 1017, 1019 (8th Cir. 1972); *United States v. Griffin*, 464 F.2d 1352, 1355 (9th Cir. 1972); *United States v. Mones*, 336 F. Supp. 1322, 1324 (S.D. Fla. 1972); *Dufrane v. Sheriff Washoe County*, Nev. , 495 P.2d 611,

(1972); *Cf. United States v. Parrott*, 248 F.Supp. 196, 203 (D.D.C. 1965).

Several of these same courts in post-*Marion* cases have interpreted the Supreme Court as requiring that both prejudice and intentional delay be proven in order for a Fifth Amendment question to arise. A typical statement of this view was recently made by the Seventh Circuit in *United States v. Detienne*, 468 F.2d 151 (7th Cir. 1972).

> (A)ppellants have not shown that the preindictment delay in this case caused substantial prejudice to their rights to a fair trial and that the delay was an intentional device to gain technical (sic) advantage over the accused. Therefore, the due process clause of the Fifth Amendment also does not require dismissal of the indictment. 468 F.2d at 156 (1972). *Accord, United States v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972); *United States v. Merrick*, 464 F.2d 1087, 1090 (10th Cir. 1972); *United States v. Beitscher*, 467 F.2d 269, 272 (10th Cir. 1972); *United States v. Lee*, 458 F.2d 32, 33 (9th Cir. 1972) per curiam.

In summary the Second, Third, Fifth and Eighth Circuits require only the proof of actual prejudice, the First and Tenth Circuits require the proof of actual and intentional prejudice. The Seventh and Ninth Circuits have within the year 1972 stated both views. The only possible conclusion to be drawn from these facts is that the lower courts are uncertain as to the scope of *Marion* and are proceeding on a case to case basis with verbal deference to a test which fits the facts of each particular case.

Since delays frequently occur between an alleged criminal act and the filing of an information it is essential to determine under what conditions and circumstances delay becomes prejudicial to a defendant's defense as to be considered violative of the Fifth Amendment. This court left such consideration open, stating in *Marion* that:

> We need not and could not now determine when and in what circumstances actual prejudice requires the dismissal of prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution . . . (T)he rights of defendant to a fair trial will necessarily involve a delicate

> judgment based on the circumstances of each case. 404 U. S. at 324-25, 92 S.Ct. at 465-66, 30 L.Ed.2d at 481 (1971).

The general considerations have thus also been left for development by lower courts.

Prior to *Marion* Mr. Justice Brennan in his concurring opinion in *Dickey v. Florida*, U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) considered the issue of governmental delay with respect defendant's speedy trial rights.

> Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have avoided - whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and on the other, the length of the delay and its potential for prejudice to interests protected . . . . 398 U. S. at 52, 90 S.Ct. at 1576, 26 L.Ed.2d at 40 (dictum) (1970).

The Supreme Court of Alaska has expressed a nearly identical view with respect to pre-accusation delays. "The reason for the delay, the prejudice to the defendant, and the governmental interest in postponing accusation must be evaluated to assess a claim of violation of due process with respect to events occurring prior to indictment." *P.H. v. State*, 504 P.2d 837, 847 (Alas. 1972); *accord*, *Marks v. State*, 496 P.2d 66, 68-69 (Alas. 1972).

Analogous cases only have been examined since, unfortunately, there are no other cases which share the fact situation and due process claim presented here in Burtchett. They have not been factually explained since they were so different from Burtchett that explanation would be of little value.

The Montana Supreme Court ignored the trial court's findings of a negligent delay, seeming to excuse it on the basis of unfortunate happenstance. Thus, it cannot be determined from the Montana court's opinion whether or not it is requiring an intentional delay as an element of "actual prejudice".

The Montana Supreme Court recognized the materiality of the State's examination and testing of the destroyed evidence in the prosecution of the State's case. However, it says, in effect, such loss did not hinder Burtchett in preparing and presenting his defense.

It is inherently difficult for Burtchett to, on the one hand claim

prejudice to his defense due to the unavailability of the remains for testing, while on the other hand, having to prove what the missing evidence would be in order to have his loss considered prejudicial. The burned remains had to be tested to yield evidence and without the testing steps, which were available to the State, and are forever lost to Burtchett, he cannot by alternative means present the information contained therein which would favore his defense.

Memory, regardless of it's accuracy, cannot duplicate the information which tests on the remains may have shown. Composition of flooring materials may be recalled and the use of the heater, but it inherently cannot be recalled how those materials reacted to the heat since that requires testing.

CONCLUSION

The writ should issue because:

Circumstances and events occurring during the delay prior to filing information prejudiced Burtchett's ability to prepare and present his defense in violation of the due process clause, requiring dismissal of the charges.

In view of the divergences of the lower courts as to the requirements of *Marion*, the court

(1) can establish some guidelines as to what constitutes "actual prejudice", and

(2) can establish under what conditions (intentional, negligent or unintentional) "actual prejudice" requires dismissal of a prosecution,

(3) under the Fifth Amendment.

Respectfully submitted,
MORRISON, ETTIEN & BARRON

By _____
Counsel for Petitioner

(APPENDICES A, B, C, D, E FOLLOW)

APPENDICES

APPENDIX A

IN THE DISTRICT COURT
OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF HILL

THE STATE OF MONTANA,
Plaintiff,

vs.

MOTION TO DISMISS
AMENDED
INFORMATION

JAMES BURTCHETT,
Defendant.

Defendant moves to dismiss the amended information be dismissed on the following grounds:

1. That Defendant has been denied the right to a speedy trial and the delay caused in bringing the charges has impaired his ability to defend himself, all in violation of the Fifth and Sixth Amendments of the United States Constitution, and Article III, Sections 16 and 27 of the Montana Constitution.

2. This motion is made and based on affidavits filed in support hereof, and on oral and documentary testimony to be introduced at hearing hereon.

Defendant further moves that a time and place be fixed for hearing on this motion.

DATED January 26, 1973

MORRISON, ETTIEN & BARRON
By J. CHAN ETTIEN
Attorneys at Law
221 Third Avenue
P. O. Box 1070
Havre, Montana 59501
ATTORNEYS FOR DEFENDANT

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing MOTION TO DISMISS AMENDED INFORMATION and receipt of a copy thereof and copies of Mayer, Ettien and Yeager affidavits is hereby acknowledged this _____ day of January, 1973.

APPENDIX B

NO. 12572

IN THE SUPREME COURT
OF THE STATE OF MONTANA

1974

STATE OF MONTANA,

Plaintiff and Respondent,

- vs -

JAMES BURCHETT,

Defendant and Appellant.

Appeal from: District Court of the Twelfth Judicial District, Honorable B. W. Thomas, Judge presiding.

Counsel of Record:

For Appellant:

Morrison, Ettien and Barron, Havre, Montana
J. Chan Ettien argued, Havre, Montana

For Respondent:

Hon. Robert L. Woodahl, Attorney General, Helena, Montana
J. Michael Yeung, Assistant Attorney General, argued, Helena, Montana
Ronald W. Smith, County Attorney, argued, Havre, Montana

Submitted: June 12, 1974
Decided: Sept 13, 1974

Filed: Sept 13, 1974
THOMAS J. KEARNEY
Clerk

Honorable Robert Keller, District Judge, sitting in place of Mr. Chief Justice James T. Harrison, delivered the Opinion of the Court.

Appellant, defendant below, was convicted of the crime of arson in the first degree and arson with intent to defraud an insurer, buy jury, in the district court of the twelfth judicial district of the State of Montana, in and for the County of Hill, before the Honorable Bernard W. Thomas.

Appellant's residence, located six miles south of Havre, Montana, was substantially destroyed by fire on the night of May 14, 1971. The Havre city fire marshal, Richard D. Habeger, who was also a special deputy state fire marshal, inspected the premises on May 15, 1971, took several pictures, but was unable to make a determination as to the cause of the fire. The State Fire Marshals Office, at the instigation of the appellant's fire insurance company, called Habeger and requested that he go back to the premises for a more detailed inspection. Habeger returned on May 21, 1971, took 15 or 20 photographs and collected samples from seven different holes burned in the floor. Samples from one of the burned holes, adjacent to the floor furnace, were placed in a two pound coffee can, ultimately admitted into evidence as exhibit D; samples from six other holes,

further removed from the floor furnace, were placed into another two pound coffee can, and ultimately marked as exhibit E, but refused admission into evidence at the trial. Habeger mailed both exhibits to the alcohol, tobacco and firearms laboratory in Washington, D.C., for examination and report on May 24, 1971. He did not receive an immediate reply.

In August, 1971, appellant encountered Habeger at the Hill County Fair and asked if there had been any results from the investigation. Habeger replied in the negative. In March, 1972, appellant settled his claim with his insurance company, decided to tear down what was left of the residence, and then rebuild. Finding no one to tear down the building, appellant decided to burn down the remainder of the building. He cleared the burning with the City of Havre fire department and with Hill County, but not specifically with Habeger, and in late May 1972, burned down the remainder of the building.

The samples had been received by the alcohol, tobacco and firearms laboratory in Washington, D.C., tested on June 16, 1971, and the results, showing the presence of accelerants, mailed back to Habeger. Unfortunately, at the time the results were returned, the Havre city fire department was moving its residence and Habeger was on vacation. The letter with the results was deposited with some junk mail in a cubbyhole in a desk in the new firehall where it lay unnoticed until late September, 1972, some 15 months later, when Habeger was looking for some material for Fire Prevention Week. He immediately turned all the results of this investigation over to the county attorney for Hill County and this prosecution followed.

Appellant's contentions are as follows:

1. That the court erred in refusing to dismiss the charges on the grounds of prejudicial delay;

2. That the court erred in admitting Exhibit D;

3. That the court erred in admitting the evidence from the forensic laboratory.

Addressing appellant's first contention, there is no question but that a delay in time between the commission of an offense and the commencement of the prosecution, by the filing of an information

termed "preindictment delay" can be the denial of due process. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468. Mere delay, in and of itself, is not sufficient. There must be either actual prejudice to the conduct of the defense, or that the State intentionally delayed to gain some tactical advantage over appellant, or to harass him. United States v. Marion, supra.

In the instant case, appellant concedes in his brief that mere delay is not prejudicial in itself and that the delay in this instance was neither intentional nor purposeful. He does contend, however, that by the time he was put on noticed he was the subject of criminal action, the physical evidence had been destroyed, and he was substantially prejudiced thereby.

At a pretrial suppression hearing and at the trial, appellant called as a witness a chemist from Northern Montana College who testified that by the use of a gas chromatograph he could determine whether or not samples from other portions of the floor contained the same components that chemists in the alcohol, tobacco and firearms laboratory in Washington, D.C., found in the sample taken from the holes that had burned through the floor of the house. Evidence had been introduced by appellant that a considerable amount of kerosene smoke had been permitted to collect on the underside of the floor (from thawing frozen pipes in the cellar on a number of occasions), and that there was inlaid linoleum on the floor of the house, held in place by either asphalt or some other petroleum-based compound. Appellant's chemist testified that either, or both of these conditions could have given rise to a finding by the State's chemist that there were accelerants present. He would have ground up samples from the floor, placed them in an oven under heat, and analyzed the gases.

The chemist from the alcohol, tobacco and firearms laboratory used gas chromatography but with a different approach. When the samples were first collected by the deputy state fire marshal and placed in coffee cans, plastic lids were placed over the cans and then taped into place. When the government chemists received these cans they inserted a syringe through the plastic lids into the can, withdrew the vapors then existent, and used the gas chromatograph upon the vapors. They found gasoline or naptha present in both cans. These

were defined as accelerants, highly volatile, and with an exceptionally low flash point. They further testified that if a volatile petroleum distillate had been placed upon wood, and then stored in the open, it would not only gradually evaporate, but after a period of several months, there was no reliable technique known to detect and identify the petroleum distillate. In addition, they testified that the sooty residue from the kerosene burn and the asphalt used to set the linoleum were not volatile petroleum distillates.

In other words, the report from the government chemist was received in Havre about the end of June, 1971, more than a month following the fire. All that a chemist of the appellant could have found at that date was that he could find no presence of accelerants, which would be expected.

On the other hand, the samples examined by the government chemist, offered as State's exhibits D and E, were still intact, still sealed, and still capable of examination. For reasons not shown in the record, appellant never asked that his chemist be permitted to examine those to show that the government chemists were in error, if they were. In other words, the only evidence available to the chemists for the state was still available for the chemists for the appellant.

The trial court was correct in holding that there was no actual prejudice to the appellant occasioned by the preindictment delay.

Appellant's second contention is that the court erred in admitting exhibit D, one of the coffee cans containing samples from one of the holes burned through the floor. The contention is without merit, both factually and legally.

Deputy state fire marshal Habeger testified that he took all of the samples from each of seven holes, that he put two or three samples from the first hole in one can (exhibit D) and then he put the remaining samples in the second can (State's proposed exhibit E). He made a sketch of the premises and on the sketch indicated where each of the seven holes was. The first hole was near the floor furnace and upon Habeger's sketch he indicated "point of origin". Hole number one was never established as the "point of origin" by any proof; in fact, Habeger testified that he believed all seven holes to be simultaneous points of origin. Appellant's counsel continued to refer

to hole number one as the point of origin, and the transcript is clear that appellant's counsel became confused by Habeger's testimony and believed that Habeger had placed samples from the first three holes in the first can and samples from the remaining four holes in the second can. Since Habeger could not establish which holes had accelerants and which ones did not, defense counsel convinced the trial court that the samples in the second can were commingled, some coming from holes that had accelerants and some coming from holes that did not. The same argument is being used here to show that the same situation was true with the first can of samples. The trial court was not confused by the testimony and knew that the samples in the first can, exhibit D, came from only one hole, the first hole, the "point of origin" hole.

The only error committed by the trial court, and it was harmless, was in excluding State's proposed exhibit E. There should have been no accelerants in that house and the deputy state fire marshal took samples from that house and there were accelerants in both samples. What possible difference could it make, under the facts in this case, which hole had the accelerants? The State was in a position to prove that there were accelerants in at least two different places and exhibit E should have been admitted.

Appellant's third contention is that the court erred in admitting the evidence from the forensic laboratory in two particulars. Appellant's first point is that once the samples reached the forensic laboratory in Washington, D.C., there were several people who had access to the laboratory and therefore the custodial chain of evidence was not established.

The samples in question were collected by the deputy state fire marshal, packaged by him and mailed by him to the alcohol, tobacco and firearms laboratory in Washington, D.C. One of the chemists from that laboratory testified that he received the package, that it was kept in that laboratory and the security room, it was examined by one of the chemists from that laboratory who also testified and it had been kept in the evidence room at the laboratory until the two chemists brought the samples to Montana. This is all that is required for a prima facie case. The State must identify the particular exhibit as

relevant to the criminal charge and must show prima facie that no alteration or tampering with the exhibit has occurred. State v. Wong Fong, 75 Mont. 81, 241 P. 1072. Once that has been done, the burden of proving alteration shifts to appellant. State v. Fitzpatrick, __ Mont. __, 516 P.2d 605, 30 St.Rep. 1052.

Appellant additionally contends that the State failed to use the best evidence in proving the results of the gas chromatograph; that the chromatogram record itself should have been introduced and proof made of the standards utilized by the chemist in interpreting the chromatogram. The contention has merit, technical though it may be, but the complaint came far too late. The chemist who actually examined the samples testified that he readily detected accelerants by the use of the gas chromatogram and that there was a marked, distinguishable difference between these accelerants and the other nonvolatile petroleum distillates that the appellant contended were also in the floor. His testimony was lengthy and technical but that is the thrust of it. Following appellant's case in chief, the State called the second chemist from the forensic laboratory in Washington as its final rebuttal witness, the chemist who was in charge of the laboratory but who did not actually do the examination of the samples. Defense counsel realized during the cross-examination of this witness on rebuttal that he had overlooked both the chromatogram record and the standards, established that both were in existence, then moved to strike all of the testimony of both chemists on grounds that during their testimony of the State's case in chief, they had not used the best evidence in explaining the results of the gas chromatograph test. The trial judge properly overruled the objection. Neither was relevant to this particular witness's testimony for he testified as a custodian of the laboratory and was in no position to testify as to what the other chemists utilized for his testimony relative to the examination of the samples. As stated before, the objection came far too late.

For the foregoing reasons, judgment of the trial court is affirmed.

ROBERT KELLER

Hon. Robert Keller, District Judge
sitting in place of Mr. Chief
Justice James T. Harrison.

We concur.

GENE B. DALY
WESLEY CASTLES
FRANK I. HASWELL
JOHN CONWAY HARRISON
Associate Justices

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 12572

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

JAMES BURTCHETT,

Defendant and Appellant.

PETITION FOR REHEARING

Burtchett petitions the Court for rehearing for the reasons and grounds.

It appears from a reading of the Opinion, and a review of the record that certain facts, question and controlling decision, as hereafter set forth, have been overlooked by the court.

At Page 3 of the opinion, it recites that the Report from the forensic

laboratory was returned while the Havre City Fire Department was moving its residence and Habeger was on vacation.

The fire department moved the latter part of May and Hilla and Habeger's desks were ready for busines the forepart of June, before the report was mailed from Washington. (TRI, L.3-24, P.23; L.16-19, P.73).

The obvious inference is that Habeger came back from vacation, went through his mail, passing the report up as junk mail or overlooking it.

On top of that, Habeger made no effort to follow up though the insurance company adjustors were agitating him on the subject, and Burtchett had spoken to him about it in August of 1971.

It was primarily these facts by which the trial court found negligence in the delay.

At line 17, page 4 of the Opinion, the Court's recital states that only kerosene smoke and petroleum based adhesive compounds were in the flooring. In addition to these compounds, there was evidence of gasoline being used to thaw the pipes, smoke of which had an opportunity to impregnate the flooring. (TR I, L.26, P.46 to L.8, P.49)

At line 3, page 5 of the opinion, the opinion states that the government witnesses found gasoline or naptha present in both of the sample cans. A review of Midkiff's testimony shows there was no testimony, as such, that gasoline or naptha was present. The testimony was that compounds making up gasoline or naptha were present in the chromatograph test and that such compounds or elements came from the sample can.

Line 5, page 5 of the Opinion refers to the Midkiff testimony of volatile petroleum distillate being placed upon wood and stored in the open, and the recited results.

Midkiff actually testified that gasoline on wood in the open would disappear after a week or more, and after two weeks it would be essentially impossible to detect. (TR I, L.26, Page 87 to L.8, Page 88)

He admitted on cross examination that this test was in a laboratory, and not field condition, and that under conditions as appear in our record, he would have no way of knowing how evaporation would occur in our situation. (TR I, L.27, P. 92 to L.27, P. 93)

Again at line 10, page 5, of the opinion, there is omitted the evidence that there was also gasoline used which smoked up and impregnated the underflooring.

At line 15, page 5, of the opinion, the court states:

> "All that a chemist for the appellant could have found at that date was that he could find no presence of the accelerants, which would be expected."

This completely overlooks and is absolutely contrary to Yaeger's testimony as set out in appellant's brief.

Midkiff and Pro testified in essence that gasoline and naptha were accelerants, and that they found compounds and elements in the test common to these mixtures.

Yeager testified that, after the impregnated flooring was subjected to heat, he could find these same elements.

The opinion overlooks the fact that the flooring had been subjected to the intense heat of the fire in question. It follows from that Yeager would have to subject his samples to similar heat, if the flooring was available.

At line 17, page 5, of the opinion, the opinion scores the app[illegible] for not having his chemist examine the samples in the cans. As we attempted to point out in oral argument, this would prove nothing other than what the chemist found in the can originally. Appellant has never contended that the government experts did not find what they said they found in the sample cans. What we are saying is that, on the basis of the record submitted to Yeager for his expert testimony, other areas of the floor could be shown to have had impregnated in them the same elements common to gasoline and naptha, as did the existing samples taken by the State and were from thawing and adhesives. Such could have the effect of influencing the jury favorably toward defendant in its deliberations. By the loss of the flooring, we were unable to do this which was prejudical to appellant.

It is submitted that this Court has fallen into the same error as the trial court. It assumes the government experts testimony is the gospel and our chemist could not produce what he says he could.

The Court's opinion recognizes a conflict between Midkiff-Pro and Yaeger. We were entitled to the same chance of physical tests as the

State to confirm Yaeger's position, but could not because of loss of the flooring.

Appellant's plight is pointed out by the Court's following comment on the samples:

> "The State was in a position to prove that there were accelerants in at least two different places and Exhibit E should have been admitted."

Again the quote of the Court assumes the existence of naptha or gasoline, and does not speak of the elements common to gasoline or naptha as testified to by the government chemist.

If the flooring had been available, then, according to Yeager, we could have established the presence of compounds common to the accelerants in other areas of the floor than that which was tested by the State.

By destruction of the flooring appellant "was in a position" of being unable to prove the presence of compounds from smoke and adhesives which are also common to naptha and gasoline in other areas of the floor.

At line 9, page 6 of the opinion, the opinion states that hole Number 1 was never established as the "point of origin", overlooking Habeger's testimony at TR I, P.32, L.16 to P.33, L.20, as well as other points in the transcript, e.g., the quotation at the bottom of page 17, of appellant's brief.

Habeger stated that, by his sampling, he intended to establish that each of the holes contained accelerants. (See quotations commencing at the top of page 26, appellant's brief.)

Whether or not the State could have proved it's case by merely showing the existence of accelerants in the house is not the issue here. If the State attempts to prove more than necessary (overtrying) the defendant has the right to meet the offered evidence and object to its admissibility.

As to the proper foundation established in the results of the chromatograph tests as related at pages 7 and 8 of the opinion.

A review of Midkiff's testimony shows that the entire procedure used was not brought out, and Midkiff's testimony did not inkle the omission.

The opinion goes on to state that Pro "was in no position to testify

as to what" Midkiff "utilized for his testimony relative to the examination of the samples.

The opinion overlooks Pro's testimony which we quote:

> "Q. Would you explain your use of the machine?
>
> A. I bought the first machine in the Bureau. I was one of the pioneers in this work and I now have fourteen machines in my department and a number of these machines in our field laboratories. And I have sponsored this type of forensic application that is gas chromatography and scientific crime detection. This came under my supervision. Basically our forensic branch was the old research and development. We just grew into a large forensic area which now has been severed and a new research and development branch set up but these machines are well known to me.
>
> Q. Are you familiar then with the results one would get, the machines, the chromatograph?
>
> A. Yes.
>
> Q. The chromatrograph?
>
> A. The chromatogram is the resultant product from injecting a sample into the gas chromatograph.
>
> Q. And have you had any experience in observing gas chromatographs, themselves, from the machines from where samples of gasoline were sent into it?
>
> A. Yes. As a matter of fact, Charley runs three of them at one time. They are constantly being run and I see them almost every day and we have gone past the stage of the gas chromatograph. We now couple the gas chromatograph with a mass spectograph which is a highly sophisticated piece of equipment." (TR III, L. -30, P.408, L.1-2)

While the opinion calls the contention "technical", it remains that the appellant did not have the opportunity to cross examine as to the omitted laboratory procedures.

Lastly, it is submitted that the Court has overlooked the result it reached in *State ex rel Stimatz vs. District Court-and McLernan*, No. 12777, handed down June 5, 1974, one week before our own case was argued.

Stimatz involved a manslaughter felony complaint filed in justice court against a woman driver, occurring when the woman was allegedly driving while intoxicated. A continuance was obtained by the accused's attorney. Later the county attorney's office had hearing on the complaint continued without date and the matter was dormant

for a year. Thereafter, when the county attorney's office moved on the case, the justice of the peace dismissed under the Federal Sixth Amendment for lack of speedy trial. The county attorney then went to district court with an affidavit of probable cause and motion for leave to file information direct. Upon hearing, the district court denied the motion, on the ground of lack of speedy trial under the Sixth Amendment. There is no showing in the record that the accused was actually prejudiced in any way by the delay.

Without opinion, this court denied the writ requested by the county attorney, the result, in effect, affirming the district court.

The "speedy trial" cases reviewed by the writer concern only courts trying and giving judgment. A felony complaint in justice court is only for purposes of determining probable cause. Even if the justice finds no cause, the State is not foreclosed from filing for leave in district court. Thus, in respect, *Stimatz* is akin to a Fifth Amendment "delay" case.

On the basis of the supreme court file, the result can only be reationalized on the theory (1) of a 12-month delay, (2) most of which was the neglect of the State, and (3) such delay coupled with the State's negligence is inherently prejudicial, and in violation of the "speedy trial" requirement. In Burtchett we have a negligent 15-month delay.

We submit that if the facts in *Stimatz* are inherently prejudicial, then the evidence of prejudice offered by Burtchett is actual prejudice, and Burtchett is entitled to a rehearing and eventual dismissal of the charges, as were those of Mrs. Eddy.

Respectfully submitted,
MORRISON, ETTIEN & BARRON

By J. CHAN ETTIEN
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501
ATTORNEYS FOR PETITIONER

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 12572

STATE OF MONTANA,

Plaintiff and Respondent,

- vs -

JAMES BURTCHETT,

Defendant and Appellant.

ORDER

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above-named cause is hereby denied.

DATED this 21st day of October, 1974.

APPENDIX E

EXCERPTS OF YEAGER'S TESTIMONY

The critical testimony of Yeager under the motions to dismiss, follows:

"Q. What was the effect of this sooty, oily smoke on the underpining of the house and floor, the subfloor?

A. The sooty smoke would of course, result from the insufficient oxygen to burn all of the fuel in the heater. And, much of the fuel then which is vaporized would be collected in the soot. This would rise, collect on the floor and then the volatiles or the nonburned material would tend to permeate into the wood and remain there.

Q. And would this be the tendency of this smoke everytime that burner was used?

A. Yes, each time that they were used there was any smoke of any amount, you would have the same thing.

Q. Now, Mr. Mayer's affidavit also indicates that the type of linoleum and from the appearance of the linoleum on the floor which it appeared very old to him, that it was so-called asphalt backed or based linoleum. Would you describe to the court, what, in days gone by, what kind of compound or asphalt compound were used in laying the linoleum?

A. Well, years ago until, oh, it's been the last fifteen (15) years, asphalt was rather common material because of its adhesive quality for back linoleum gluings to floors along with felt papers and so forth and whenever asphalt is heated to a high temperature, it tends to break down in the same process that a refinery cracks petroleum and gasoline and lower volatile fuels and in the process of breaking down in the term. there is additional or a side reaction known as reforming which commonly converts some of the materials, cracked materials into what we call aromatic low carbons and they would form in that way. In addition to that, you would also find that the asphalt, in order to soften it for easy laying to the floor for application was quite often, they used various solvents, talumane, thylene, benezines, as the solvents for the asphalt to make it easy to apply.

Q. Now, if such were the case as far as using these solvents and the asphalt adherents, where is it--strike that. Where do these various petroleum compounds which you have described, where do they go when the linoleum is laid on the floor?

A. When the linoleum is put on, this sort of seals it from the top there because of the nature of the linoleum, itself, and so the solvents can only penetrate into the wood downward from the asphalt and this of course, is what makes the adhesive quality is this penetration of the volatiles of the asphalt to the wood.

Q. Now you have read the lab report from the Alcohol Division containing various, reciting the various components of benezine, hexane, iso-octane, toluene and xylene. Based on the affidavit of Mr. Mayer, would the action which you have described from the smoking and the asphalt compound, could those show up in such a report?

A. I should think so. I don't see any reason why they shouldn't still be present.

Q. Now, you have been advised, have you not, that Mr. Burtchett destroyed the remaining parts of his house by fire back, or last summer sometime?

A. Yes.

Q. Now, if that house were still existent, would there be a way to check the floor itself and the wood flooring to check it one way or another through sampling to test it?

A. Yes. It could be check at any time.

Q. And if you were asked to do that, how would you do it?

A. Well, I would take a, probably first grind the wood up to get it in finer form, get it in some kind of tight container. Evacuate it to get the air out of it so it wouldn't have the air problem and heat it in a furnace of some type to volatilize any thing in there which is volatile and the gases which came off that would be injected into the gas chromatograph and an electronic recorder would record all components which were in that particular fuel or that gas that came off the wood.

Q. So that you're saying here, taking the conclusions which you have given the court here as to the probabilities of these petroleum compounds through scientific tests, sampling and testing, you could determine whether or not your conclusions were positively correct?

A. Well, I hate to say positively because there is room for error in any analytic procedure but I would say the gas chromatograph which we would get from that would be fairly con sistent over a series of samples.

Q. Throughout the floor area?

A. Yes.

Q. And by proper sampling you could determine whether or not that was true of that floor area which had been exposed to

the smoke compounds or the asphalt compounds which you testified?
"A. Yes."
(Tr.28, 1.17 - Tr.31, 1.21)
"Q. Now based on your testimony and the testimony which has been recited to you and I may further add that subsequent to the fire of May 14, Mr. Burtchett, with the consent of the City of Havre Fire Department and County Fire Department, finally just simply burned down the rest of his house the later part of June, 1972. And, with that in mind, based on what you have already testified to, if that house still existed, would you be able to go in and take tests, samples of the floor and determine whether or not the flooring throughout the floor which was exposed to the asphalt compound and the soot smoke, contain components which were common to gasoline?
"A. Yes. There would be very little problem there. Take the sample and process it.
"Q. And based on your testimony which I have recited to you, in your opinion, would, if these tests had been able to have been taken, in your opinion, would components common to gasoline have shown up in your tests on the chromatograph?
"A. If they were there, they would show up.
"Q. And based on the testimony which has been recited to you, would these various components and the various soot smoke which I have recited to you and the asphalt, would a number of these components which were common to gasoline show up on the chromagraph?
"A. They could come from any of the petroleum products which had been subjected to heat."
(TR. 392, 1.20 - Tr.393, 1.17)

"MR. ETTIEN: Alright, I will go at it this way, Your Honor. There is no use hanging everything up. What, started with the highest volatile components, gasoline, will you briefly give the components which make up gasoline or naptha, which is commonly known as white gas, is that true?
"A. Well, by law, the gasoline must have a maximum or a temperature, let's put it that way, the point at which the gasoline is cut off and we go into kerosene, is about a 150° in temperature. This is to protect it as an explosive material.This includes then the components of, starting with the sixty carbon atom compounds and moving through up the ten, about a ten carbon atom compound. Now, in terms of the names, these are called hexane, heptane, octane, notane and decane, are the terms. And, in those, the way the compounds the varieties

of the compounds, well, there are three defferent hexanes. There are about seven different heptanes. In the octanes, probably -- I haven't figured it out, it's quite a little more. So, in each of those, you have a rather large number of different compounds, each having its own special boiling point and flash point and so forth.

"Q. In the compounds, as to hexane, is it the most volatile of the compounds?

"A. Hexane has a boiling point about 50° This is centigrade scale, I am speaking.

"Q. In other words, it would evaporate at 50°?

"A. Yes. It's first. That would be about 122°, if you wanted Fahrenheit.

"Q. Now, with the evidence at point one of the origin of the fire, showing that there was gasoline present at point 1 or origin 1 of the diagram and that the fire generated an extremely high temperature, what would that do as far as in your opinion and from your knowledge, as far as the hexanes were concerned?

"A. I would feel that the hexane, with its low vilatility would be the first to vaporize and burn.

"Q. And after a fire of any length of time with extremely high heat, in your opinion, would hexane be present?

"A. I wouldn't expect to find it, no."

(Tr.393, 1.26 - Tr.395, 1.7)

On cross:

"A. I don't quite understand what your overall picture here. It's a little confusing to me. First, you asked me about the no heating. Wood which had asphalt on it. Now, my problem is this: this wood was heated and the asphalt was heated and the fractured components of the asphalt would naturally be in the wood. Now, you said before heating, would there be any. After this had been heated, I can see where there would be volatile materials still in the wood which could slowly seep out of it.

"Q. But, would they vaporize to such an extent that you could take a sample with a syringe?

"A. If they were fractured to a small enough fractions, they would, yes."

(TR.398, 11.11 - 24)

CERTIFICATE OF SERVICE

I, J. Chan Ettien, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10 day of January, 1975, I mailed three (3) copies of the foregoing to Hon. Robert L. Woodahl, Attorney General, State of Montana, Helena, Montana 59601, attorney for respondent.

MORRISON, ETTIEN & BARRON

By J. Chan Ettien

Attorneys at Law
339 Third Street
P. O. Box 1030
Havre, Montana 59501

ATTORNEYS FOR PETITIONER